

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PREMERA BLUE CROSS,

Plaintiff,

v.

GS LABS, LLC,

Defendant.

No. 2:21-cv-01399-LK

AGREEMENT REGARDING
DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION AND ORDER

Premera Blue Cross and GS Labs, LLC (“GS Labs”) (collectively, the “Parties”) hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

A. General Principles

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the

1 application of the proportionality standard in discovery, requests for production of ESI and related
2 responses should be reasonably targeted, clear, and as specific as possible.

3 **B. ESI Disclosures**

4 Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each
5 party will disclose:

6 1. Custodians. The ten custodians most likely to have discoverable ESI in their
7 possession, custody, or control. The custodians will be identified by name, title, connection to
8 this litigation, and the type of the information under the custodian's control. For clarity, ESI
9 includes (but is not limited to) e-mail, text messages, and any messages exchanged on a party's
10 internal networking system, i.e., Slack, Teams, etc.

12 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g., shared
13 drives, servers), if any, likely to contain discoverable ESI.

14 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
15 contain discoverable ESI (e.g., third-party email providers, mobile device providers, cloud
16 storage) and, for each such source, the extent to which a party is (or is not) able to preserve
17 information stored in the third-party data source.

18 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
19 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the
20 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

22 **C. ESI Discovery Procedures**

23 1. On-site inspection of electronic media. Such an inspection will not be required
24 absent a demonstration by the requesting party of specific need and good cause or by agreement
25 of the parties.
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1 2. Search methodology. The parties will timely confer to attempt to reach agreement
2 on appropriate search terms and queries, file type and date restrictions, data sources (including
3 custodians), processes for handling records and documents containing Protected Health
4 Information, and other appropriate computer- or technology-aided methodologies, before any
5 such effort is undertaken. The parties will continue to cooperate in revising the appropriateness
6 of the search methodology.

7 a. Prior to running searches:

8 i. The producing party will disclose the data sources (including custodians), search
9 terms and queries, any file type and date restrictions, and any other methodology that it proposes
10 to use to locate ESI likely to contain responsive and discoverable information. The producing
11 party may provide unique hit counts for each search query.

12 ii. The requesting party is entitled to, within 14 days of the producing party's
13 disclosure, add no more than 15 search terms or queries to those disclosed by the producing party
14 absent a showing of good cause or agreement of the parties.

15 iii. The following provisions apply to search terms/queries of the requesting party.
16 Focused terms and queries should be employed; broad terms or queries, such as product and
17 company names, generally should be avoided. A conjunctive combination of multiple words or
18 phrases (*e.g.*, "computer" and "system") narrows the search and will count as a single search term.
19 A disjunctive combination of multiple words or phrases broadens the search, and thus each word
20 or phrase will count as a separate search term unless they are related to the same category of
21 documents and records sought (*e.g.*, a search attempting to identify "banking" or "checking"
22 records). The producing party may identify each search term or query returning overbroad results
23 demonstrating the overbroad results and a counter proposal correcting the overbroad search or
24 query.

1 b. After production: Within 21 days of the producing party notifying the receiving
2 party that it has substantially completed the production of documents responsive to the requesting
3 party's requests, the requesting party may request no more than 10 additional search terms or
4 queries. The immediately preceding section (Section C(2)(a)(iii)) applies.

5 3. Format.

6 a. ESI will be produced to the requesting party with searchable text, in a format to be
7 decided between the parties. Acceptable formats include, but are not limited to, native files, multi-
8 page TIFFs (with a companion OCR or extracted text file), single-page TIFFs (only with load
9 files for e-discovery software that includes metadata fields identifying natural document breaks
10 and also includes companion OCR and/or extracted text files), and searchable PDF.

11 b. Unless otherwise agreed to by the parties, files that are not easily converted to
12 image format, such as spreadsheet, database, and drawing files, will be produced in native format.

13 c. Each document image file will be named with a unique number (Bates Number).
14 File names should not be more than twenty characters long or contain spaces. When a text-
15 searchable image file is produced, the producing party must preserve the integrity of the
16 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,
17 the revision history.

18 d. If a document is more than one page, the unitization of the document and any
19 attachments and/or affixed notes will be maintained as they existed in the original document. For
20 clarity, the producing party will produce full families (parent documents and any attachments) for
21 any non-privileged document(s) that hits on one or more of the producing or requesting party's
22 search terms, regardless of whether the document that hits on the search term(s) is the parent
23 document or an attachment to the parent document.

1 4. De-duplication. The parties may de-duplicate their ESI production across custodial
2 and non-custodial data sources, and the duplicate custodian information removed during the de-
3 duplication process tracked in a duplicate/other custodian field in the database load file.

4 5. Email Threading. The parties may use analytics technology to identify email
5 threads and need only produce the unique most inclusive copy and related family members and
6 may exclude lesser inclusive copies. Upon reasonable request, the producing party will produce
7 a less inclusive copy.

8 6. Metadata fields. If the requesting party seeks metadata, the parties agree that only
9 the following metadata fields need be produced, and only to the extent it is reasonably accessible
10 and non-privileged: document type; custodian and duplicate custodians (or storage location if no
11 custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size;
12 file extension; original file path; date and time created, sent, modified and/or received; and hash
13 value. The list of metadata type is intended to be flexible and may be changed by agreement of
14 the parties.
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16 **D. Preservation of ESI**

17 The parties acknowledge that they have a common law obligation, as expressed in Fed. R.
18 Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in
19 the parties' possession, custody, or control. With respect to preservation of ESI, the parties agree
20 as follows:
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22 1. Absent a showing of good cause by the requesting party, the parties will not be
23 required to modify the procedures used by them in the ordinary course of business to back-up and
24 archive data; provided, however, that the parties will preserve all discoverable ESI in their
25 possession, custody, or control.
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2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P. 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure where that data is identified after a disclosure or response is made (unless excluded under Sections (D)(3) or (E)(1)-(2)). For clarity, the parties will not be required to log privileged or work product documents created after the filing of the complaint in this matter. The parties also will not be required to re-run search terms for a previously agreed custodian if they have completed running search terms in full through the ESI for such custodian.

3. Absent a showing of good cause by the requesting party, the following categories of ESI need not be preserved:

- a. Deleted, slack, fragmented, or other data only accessible by forensics.
- b. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system.
- c. On-line access data such as temporary internet files, history, cache, cookies, and the like.
- d. Data in metadata fields that are frequently updated automatically, such as last-opened dates (see also Section (E)(5)).
- e. Back-up data that are duplicative of data that are more accessible elsewhere.
- f. Server, system, or network logs.
- g. Data remaining from systems no longer in use that is unintelligible on the systems in use.
- h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that a copy of all such electronic data is automatically saved in real time elsewhere (such as on a server, laptop, desktop computer, or “cloud” storage).

E. Privilege

1. A producing party will create a privilege log of all documents fully withheld from production on the basis of a privilege or protection, unless otherwise agreed or excepted by this

1 Agreement and Order. Privilege logs will include a unique identification number for each
2 document and the basis for the claim (attorney-client privileged or work-product protection). For
3 ESI, the privilege log may be generated using available metadata, including author/recipient or
4 to/from/cc/bcc names; the subject matter or title; and date created. Should the available metadata
5 provide insufficient information for the purpose of evaluating the privilege claim asserted, the
6 producing party will include such additional information as required by the Federal Rules of Civil
7 Procedure. Privilege logs will be produced to all other parties no later than 30 days after
8 delivering a production unless an earlier deadline is agreed to by the parties.
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10 2. Redactions need not be logged so long as the basis for the redaction is clear on the
11 redacted document. Documents and records that have been redacted for the sole purpose of
12 removing Protected Health Information do not need to be logged.

13 3. With respect to privileged or work-product information generated after the filing
14 of the complaint, the parties are not required to include any such information in privilege logs.
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16 4. Activities undertaken in compliance with the duty to preserve information are
17 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

18 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this matter
19 will not, for the purposes of this proceeding or any other federal or state proceeding, constitute a
20 waiver by the producing party of any privilege or protection applicable to those documents,
21 including the attorney-client privilege, attorney work-product protection, or any other privilege
22 or protection recognized by law. Information produced in discovery that is protected as privileged
23 or work product will be immediately returned to the producing party, and its production will not
24 constitute a waiver of such protection.
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6. The production of any documents in this action will not constitute a waiver of any arguments by the producing party challenging the future admissibility or use of those documents in this action.

DATED: May 25, 2022

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ORDER

The Court finds the parties' ESI agreement acceptable with the exception of the second sentence of Section E.2, which has been modified by the Court as follows: "Documents and records that have been redacted ~~to remove~~ for the sole purpose of removing Protected Health Information do not need to be logged."

Based on the foregoing agreement and the Court's modification, IT IS SO ORDERED.

Dated this 1st day of June, 2022.



Lauren King
United States District Judge